

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by ) Case No. 29554  
 )  
 **ERNEST DALE SWITZER** ) **BOARD DECISION**  
 ) (Precedential)  
 From dismissal from the position )  
 of Fire Apparatus Engineer at ) **NO. 92-14**  
 the Madera-Mariposa-Merced Ranger )  
 Unit, Department of Forestry and ) September 8, 1992  
 Fire Protection at Mariposa )

Appearances: Robert G. Shinn, Attorney at Law, representing appellant, Ernest Dale Switzer; Penny L. Schulz, Staff Counsel, Department of Forestry and Fire Protection, representing respondent, Department of Forestry and Fire Protection.

Before Carpenter, President; Stoner, Vice-President; Burgener and Ward, Members.

**DECISION**

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected a Proposed Decision of an Administrative Law Judge (ALJ) in an appeal by Ernest D. Switzer (appellant or Switzer), a Fire Apparatus Engineer who had been dismissed from his position with the Department of Forestry and Fire Protection (Department or CDF) at Mariposa. The ALJ found that appellant's actions constituted inexcusable neglect of duty, dishonesty, and misuse of state property: he relied on a non-precedential decision of the Board as authority for modifying the penalty of dismissal to a 60-day suspension without pay.

The Board determined to decide the case itself, based upon the record and additional oral and written<sup>1</sup> arguments. After review

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<sup>1</sup>The Department did not submit a written argument to the Board, but did participate in oral argument.

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of the entire record, including the transcript and written argument and having heard oral argument, the Board concludes the penalty of dismissal should be modified to a 60-day suspension for the reasons that follow.

#### **STATEMENT OF FACTS**

The appellant began work as a firefighter for Merced County in December 1980. In July 1988, the Merced County Fire Department was incorporated into the California Department of Forestry.

The incidents alleged to have justified the adverse action of dismissal occurred during July and August of 1990 while appellant was employed at Fire Station 72 in Santa Nella. Appellant and Fire Apparatus Engineer Manuel Burt De Costa (De Costa) rotated two day shifts during the summer of 1990.

#### **THE OIL INCIDENT**

On July 21, 1990, appellant's co-worker, De Costa, arrived at work intending to perform the "number two service" on a piece of fire apparatus known as Water Tender 72. The number two service involved not only the general "number one" maintenance performed on the apparatus on a daily basis, but also involved changing the oil, oil filter, fuel filter and air filter. The maintenance schedule called for the number two service to be performed once every six months. According to De Costa, Water Tender 72 was scheduled for the number two service on July 22.

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When De Costa arrived at work on July 22, appellant informed him that he had already performed the number two service on Water Tender 72. Appellant had also recorded in the maintenance records that he had completed the required maintenance. When De Costa checked under the hood, however, he noted that the oil was black and the oil filter had not been touched. He telephoned appellant at home and appellant assured him he had performed the maintenance. Only after being challenged by De Costa at the time of the next shift change, two days later, did appellant admit to De Costa that he had not in fact completed the number two service and explain that he intended to complete the number two service on his next shift.

Appellant admitted on the stand that he initially lied to De Costa about having completed the maintenance. He testified he was under stress at the time of the incident as a result of the recent death of his father-in-law and was too tired to change the oil before he went home. Since he had received a letter of warning on May 3, 1990 from his Division Chief, faulting him for not doing his share of the maintenance and ordering him to perform the next maintenance on the water tender, appellant did not want to leave the work to De Costa, and was determined to finish it on his next shift.

Prior to the oil incident recounted above, appellant had contacted Fire Captain Tom Egling (Egling) to find out how much oil

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was required for a water tender oil change. Appellant had had no training regarding the maintenance of the water tender and wanted to be sure he knew what was required. Based upon appellant's contact with Egling, upon vague information that unspecified quantities of oil had been missing from the fire station, and upon appellant's false claim that he had completed the oil change prior to his actually doing so, the Department concluded that appellant had misappropriated state oil for his personal use. Such a conclusion is not borne out by the evidence.<sup>2</sup>

#### THE ANTIFREEZE INCIDENT

On July 22, 1990, when De Costa came on duty to relieve appellant, he noticed a gallon antifreeze bottle sitting on the ground in the apparatus room. He glanced at the bottle for only a few seconds, and testified that the bottle looked clean. He did not touch the bottle or unscrew the cap to determine whether the foil safety seal was broken or intact. He observed appellant pick up the bottle and take it to the back of the room. He later observed appellant at his trunk. When appellant left the station, the antifreeze bottle was gone. De Costa checked the supply room

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<sup>2</sup>The ALJ found that the Department's conclusion in this regard was supported by the evidence. The record, however, is devoid of substantial evidence to support a finding that any specific quantity of oil was actually missing on any particular date. Furthermore, it is undisputed that records documenting the use of oil in the fire station lawn mower and two generators disappeared during the investigation of the adverse action and were missing at the time of the hearing.

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and noticed only two gallons of antifreeze, where there had been three containers of antifreeze when last he checked two days earlier. De Costa concluded that appellant took one gallon of antifreeze home.

On July 24, 1990, at the request of his supervisor, De Costa wrote a memorandum documenting the alleged theft of the antifreeze. In that memo, he asserted it did not appear to him that the antifreeze was being used in the equipment on July 22, 1990. On direct examination concerning the memo, De Costa testified he knew nothing of any vehicles leaking antifreeze.

Significantly, on the same day De Costa reported the missing antifreeze, he also filled out a Faulty Equipment Report dated July 24, 1990, indicating that the pump engine was using a lot of coolant/water and that he was unable to determine where the water leak originated. On cross examination, De Costa admitted that on July 24, 1990, the radiator for the pump engine was down three or four inches and that there may have been a quarter of a gallon coolant and water in a puddle.

The appellant testified that the antifreeze container observed by De Costa was his own container that he refilled with water to keep in his personal car which had been leaking from the water pump area. He also testified that there were coolant leaks in the fire station vehicles that required him to constantly add small amounts of antifreeze.

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Another Department employee, Kathryn Greco, testified that when she was walking out of a training meeting on July 22, 1990, she observed a fairly large puddle of antifreeze under appellant's squad car and saw antifreeze leaking out.

Fire Apparatus Engineer Paul Van Gerwen, who had worked at the Santa Nella station prior to appellant's tour of duty there, also testified that he had noticed slight leaks of coolant from the squad car and often had to add small amounts of antifreeze.

The record also reflects that the doors to the fire station were often left open when fire personnel left the station and that the key to the storage area was easily accessible. Thus, if supplies were missing, it is entirely possible they were stolen by non-employees.

We are not convinced that a preponderance of the evidence supports a finding that appellant stole a gallon of antifreeze. The only evidence to support such a conclusion is purely circumstantial. De Costa had no way of actually knowing whether the antifreeze bottle he saw on the ground during the shift change actually contained antifreeze or merely water, as appellant claimed. De Costa admitted that while he recorded his own use of antifreeze, other employees may not have done so. The evidence that various coolant leaks in the fire station vehicles necessitated the adding of antifreeze in small amounts over a lengthy period of time, taken together with De Costa's own

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testimony that he himself reported a coolant leak during the time period appellant was accused of taking the antifreeze, fairly detracts from any circumstantial evidence that would support a conclusion that appellant stole the missing gallon of antifreeze.

#### INCIDENTS RELATING TO THE MOBILE HOME PARK FIRE

##### Failure to Properly Supervise In-Lieu

On July 22, 1990, the appellant responded to a fire in a mobile home park in Santa Nella. A mobile home and a 1969 El Camino vehicle were burned.

From August 17 to 26, one Don Waters (Waters) was working at the Santa Nella fire station in lieu of serving a jail sentence under an agreement between Waters and the Merced County Sheriff's Department. The agreement, a copy of which Waters submitted to De Costa, provided that Waters agreed to work a minimum of 8 hours and a maximum of 10 hours each day of his sentence between August 17, 1990 and August 26, 1990. The agreement was not signed by appellant or De Costa, or by anyone representing the Department of Forestry and Fire Protection.

Several witnesses testified as to their understanding of the obligations of CDF employees under the in-lieu agreements, and as to the monitoring of those agreements at the fire station in Santa Nella and at other fire stations. The CDF employees who testified all seemed to have different understandings as to what exactly was required of them in terms of supervising the workers subject to the

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in-lieu agreements. CDF provided neither policies, procedures or training of any kind to CDF employees as to the nature of the supervision to be accorded the in-lieu workers. While in theory, the agreements required the in-lieu workers to work 8 to 10 hours per day, in practice the workers were often allowed to go home early when they had finished the work assigned to them or when the supervising employee had to leave for an emergency, for training, or for other assorted reasons.

During Waters' tenure at the fire station, an employee of the mobile home park contacted the fire station to determine whether anything could be done to remove the debris left after the fire and to eliminate the potential safety hazard. Since Waters had mentioned to appellant that he needed work to support his family, appellant made arrangements to have Waters meet the owner of the mobile home park. While on state time, and during the hours that Waters would normally be working at the fire station under his in-lieu agreement,<sup>3</sup> appellant drove Waters in his state vehicle to the site of the fire to meet with the owner Greg Armando (Armando) regarding the cleanup. Armando paid Waters \$200 in three installments for the cleanup.

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<sup>3</sup>There is no evidence that Waters had any work to be done at the fire station either on the day he met with Armando to work out their agreement or on the days Waters actually performed the work for Armando and Dawn Hoffman.



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Allegation of Appellant's Private Gain and Unethical Behavior

Appellant initially offered to purchase a mobile home trailer and an El Camino that were destroyed in the fire from their owner Dawn Hoffman (Hoffman) for the sum of \$100.00. Hoffman was more interested in getting the property cleaned up than in selling the trailer. Originally, appellant agreed to clean up the property for Hoffman. He later paid Waters \$150.00 for cleaning up the property. Hoffman subsequently gave the mobile home trailer and El Camino to appellant and Waters moved those items to the fire station. The items were not of any real salvage value. Appellant eventually fixed up the trailer to move cars, which he worked on as a hobby. He allowed members of his car club to use some parts of the El Camino on their own cars. He did not receive any money for these car parts.

**CHARGES**

Appellant was charged with violating Government Code section 19572, subsections (d) inexcusable neglect of duty; (f) dishonesty; (p) misuse of State property, and (t) other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the employee's agency or employment. The factual basis for the charges included allegations that appellant falsified maintenance records, stole antifreeze, used his position for personal gain, failed to properly supervise

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an in-lieu worker, and engaged in unethical behavior resulting in discredit to the Department.

### **ISSUE**

Is the adverse action of dismissal warranted based upon the evidence adduced at the hearing?

### **DISCUSSION**

#### **The Charged Conduct**

With respect to the "oil incident," appellant admitted that he recorded in the maintenance records that he had performed an oil change on Water Tender 72, when in fact he had not yet performed the oil change. Appellant did in fact change the oil on his next shift. As noted above, the evidence is insufficient to establish that appellant misappropriated any oil to his own use. The falsification of the maintenance records and the misrepresentations to De Costa do establish the charge of dishonesty. Since the date of the oil change fell on De Costa's shift and since appellant did complete the oil change on his next shift, appellant's failure to complete the oil change on July 21 does not constitute inexcusable neglect of duty.

Neither do we find the evidence sufficient to support a finding that appellant misappropriated antifreeze. Although entitled to some weight, the ALJ's factual finding that appellant stole a gallon of antifreeze, even if based on a credibility determination, is not conclusively binding on the Board.

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Camera v. NLRB (1951) 340 U.S. 474, 495-496; McPherson v. Public Employment Relations Bd. (1987) 189 Cal.App.3d 293, 304). The credibility determinations of an ALJ must be viewed in light of the whole record and the circumstances surrounding the incident under review. [Karen A. Johnson (1992) SPB Dec. No. 92-02]. The Department must prove the charge of theft by a preponderance of the evidence. Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194 at 204, fn.19. In the instant case, the record was replete with evidence that would explain the fact that antifreeze had been used in several vehicles that were leaking coolant. The storage room where the antifreeze was kept was not secure. Record keeping for antifreeze used was not consistent. Appellant's explanation that the antifreeze bottle observed by De Costa was filled with water and not antifreeze is not inherently improbable considering all the circumstances. The charge that appellant misappropriated antifreeze is not supported by a preponderance of the evidence.

Appellant's misconduct with respect to the in-lieu worker consists primarily of using state time and his state vehicle to drive the in-lieu employee to the mobile home park to meet with Armando, the owner. The evidence is insufficient to establish that appellant's allowing the in-lieu worker to leave the fire station early breached any clearly established policies or procedures of the Department. Nothing in the record establishes that there was work to be done in the fire station that the in-lieu

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worker failed to do or that appellant received any type of training regarding the extent of his obligation to supervise in-lieu. Appellant's early release of the in-lieu worker did not constitute inexcusable neglect of duty, dishonesty or other failure of good behavior under Government Code section 19572, subsections (d), (f) or (t).

The use of state time and a state vehicle to facilitate Waters' arrangement with Armando did constitute inexcusable neglect of duty, dishonesty, misuse of state property. Although appellant became aware of the mobile home trailer and El Camino through his work, we do not find he acted in an unethical manner in acquiring those items. Furthermore, it was undisputed that the items were of minimal salvage value. Neither do we find that any of appellant's actions cast discredit upon the Department.

#### **Penalty**

Having found the evidence supports the findings of fact and conclusions of law set forth above, the only question left for determination is the appropriate level of penalty.

When performing its constitutional responsibility to "review disciplinary actions" [Cal. Const. Art. VII, section 3 (a)], the Board is charged with rendering a decision which, in its judgment, is "just and proper." (Government Code section 19582). One aspect of rendering a "just and proper" decision involves assuring that the discipline imposed is "just and proper." In determining what

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is a "just and proper" penalty for a particular offense, under a given set of circumstances, the Board has broad discretion. (See Wyllie v. State Personnel Board (1949) 93 Cal. App.2d 838, 843) The Board's discretion, however, is not unlimited. In the seminal case of Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194, the California Supreme Court noted:

While the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, it does not have absolute and unlimited power. It is bound to exercise legal discretion which is, in the circumstances, judicial discretion. (Citations) 15 Cal.3d at 217-218.

In exercising its judicial discretion in such a way as to render a decision that is "just and proper," the Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board considers are those specifically identified by the Court in Skelly as follows:

...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, [h]arm to the public service. (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (Id.)

#### Harm to the Public Service

In this case, appellant admitted that he made a false notation on a record indicating he had completed an oil change that he did not complete until three days later. He also admitted that he initially lied to his co-worker when he claimed he had completed

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the maintenance on Water Tender 72. Appellant's falsification of the maintenance records and misrepresentations to his co-worker obviously caused the co-worker some aggravation and concern in that he felt he had to confront appellant into admitting that he had not done the maintenance work he claimed to have done.

The evidence also established that appellant used state time and his state vehicle to introduce Waters, the in-lieu worker, to Armando, the owner of the mobile home park. Using state time and resources to conduct personal business, however well-intentioned, inherently harms the public service.

#### Circumstances Surrounding the Misconduct

While we do not find appellant's actions in falsifying the maintenance records and then lying about completing the maintenance to be excusable, some mitigating factors militate against treating appellant's dishonesty as a dismissible offense.

First, we note that the Department succeeded in proving only that appellant prematurely recorded and represented on one occasion that he had completed the maintenance on a vehicle, when in fact he had not so completed it. When confronted by his co-worker, appellant eventually admitted that he had not completed the maintenance. Appellant testified that as his father-in-law had recently passed away after a long battle with cancer, he was operating under considerable strain at the time of this incident.

He had already received a written warning mandating that he perform the next

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maintenance on the vehicles as he had not been performing his share of the maintenance duties. As he was tired at the end of his shift, he decided to delay completing the maintenance until his next shift, but represent he had performed the maintenance so his co-worker would not do it. While appellant's dishonesty in this instance is certainly not excused, neither does it warrant dismissal.

Similarly, while we do not excuse appellant's using state time and his state vehicle to facilitate the meeting between the in-lieu worker and the mobile home park owner, the circumstances are such that we do not view appellant's conduct in this regard as so egregious as to justify dismissal. Appellant had been contacted by an employee at the mobile home park and asked what the Department could do about removal of the fire debris. In facilitating the meeting between Waters and Armando, appellant believed he was performing a community service by arranging for the cleanup of a fire site which was a potential, if not actual, safety hazard. While appellant's priorities were misguided, his intentions were not malevolent: he felt he was providing work for a man who needed the money as well as a service for the mobile home park owner. Under all the circumstances, appellant's misconduct, while serious, does not justify the ultimate penalty.

Likelihood of Recurrence

We are not convinced that there is such a likelihood of recurrence of appellant's misconduct with respect to his misrepresentations regarding vehicle maintenance or his misuse of state time and property so as to justify dismissal in this case.

**CONCLUSION**

In sum, the majority of the charges levied against Switzer were not supported by a preponderance of the evidence. The evidence does not establish that appellant stole oil or anti-freeze. The evidence does not warrant a finding that appellant acted unethically in acquiring the fire-ravaged trailer or car. The record does not reflect that the Department had issued any clear mandate with respect to the supervision of in-lieu workers--thus, to charge appellant with a breach of procedures that were not consistently taught nor enforced would be unfair.

At most, the record supports a conclusion that: appellant falsified a fire vehicle maintenance record, misrepresented the status of the vehicle maintenance to a co-worker, and used a state vehicle during state time to engage in what was not technically the state's business. The harm resulting from appellant's misconduct, the circumstances surrounding the misconduct, and the unlikelihood of recurrence militate against our affirming the ultimate penalty of dismissal. As all three offenses do involve dishonesty,



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however, a serious penalty is warranted. A 60-day suspension without pay is an appropriate penalty.

**ORDER**

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code sections 19582 and 19584, it is hereby ORDERED that:

1. The above-referenced adverse action of dismissal taken against Ernest Dale Switzer be modified to a sixty (60) day suspension.

2. The Department of Forestry and Fire Protection and its representatives shall reinstate appellant Ernest Dale Switzer to his position of Fire Apparatus Engineer and pay to him all back pay and benefits that would have accrued to him had he not been wrongfully terminated, from a date sixty (60) days after the effective date of termination to the date of reinstatement.

3. This matter is hereby referred to the Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due appellant.

4. This opinion is certified for publication as a Precedential Decision (Government Code section 19582.5).

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STATE PERSONNEL BOARD\*

Richard Carpenter, President  
Alice Stoner, Vice-President  
Clair Burgener, Member  
Lorrie Ward, Member

\*Member Richard Chavez did not participate in this decision.

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on September 8, 1992.

GLORIA HARMON  
Gloria Harmon, Executive Officer  
State Personnel Board